IN THE

Supreme Court of the United States

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OCTOBER TERM, 1951.

No. 492

MARIKO KUNIYUKI,

Petitioner,

vs.

DEAN ACHESON, as Secretary of State of the United States of America,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner,

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DEAN ACHESON, as Secretary of State of the United States of America,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit [R. 138, 139] reversing the judgment of the United States District Court for the Western District of Washington [R. 44] which had adjudged petitioner to be a citizen of the United States and not to have lost her citizenship by reason of her voting in Japan in April, 1946.

Opinion Below.

The opinion of the trial court [R. 8] is reported at 94 Fed. Supp. 358. The opinions of the court below [Opinion, R. 130; Opinion on rehearing, R. 140] are reported at 189 F. 2d 741 and 190 F. 2d 897, respectively.

Jurisdiction.

The judgment of the court below [R. 138] was filed and entered on June 14, 1951. Petition for rehearing was timely filed [R. 139] and the order of the court denying said petition was made and entered on July 27, 1951 [R. 139]. By order, dated October 16, 1951, of the Hon. William O. Douglas, time within which this Petition for Writ of Certiorari may be filed was extended to and including December 24, 1951.

The question as to the constitutionality of the statute involved was raised by petitioner in the lower court (Appellee's Br. 24), but not discussed in the court's opinion. This fact was pointed out to the court below in the Petition for Rehearing (p. 15) and the argument of unconstitutionality again made. The point was again not discussed in the court's opinion on denial of rehearing [R. 140].

The jurisdiction of this court is invoked under the provisions of 28 U. S. C. 1254(1).

Statute Involved.

Title 8, United States Code, Section 801(e) provides in pertinent part:

> "A person who is a national of the United States, . . . by birth . . . shall lose his nationality by: . . .
>
> (e) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

Questions Presented.

1. Whether 8 U. S. C. 801(e) on its face and as construed and applied to petitioner, a native born American citizen, to deprive her of that citizenship, is unconstitutional in violation of the 14th Amendment to the Constitution which granted her that citizenship.

2. Whether, within the meaning and intent of 8 U. S. C. 801(e), the elections held in Japan in 1946 and 1947 under orders and at the instance of General Douglas MacArthur, Supreme Commander for the Allied Powers, were political elections.

3. Whether, within the meaning and intent of 8 U. S. C. 801(e), Japan in 1946 and 1947 was a foreign state.

4. Whether a person, such as petitioner, who voted in Japan in 1946 and 1947, as a result of overwhelming pressure, brought about by the United States' armed forces in Japan, and in a desire to carry out the aims and objectives of the United States in Japan, shall be decreed to have lost her United States Citizenship.

5. Whether the decision of the lower court, as distinguished from the decision of the trial court who had opportunity to and did observe the petitioner under oath on the witness stand, that petitioner did not vote involuntarily, is correct for the purposes of 8 U. S. C. 801(e).

Statement.

Like hundreds of other young Nisei (American born persons of Japanese born parents), petitioner was stranded in Japan by reason of the onvent of World War II [R. 58]. And like hundreds of other young Nisei she was caught up, after the war, by the wave of the democratic spirit engendered by General MacArthur and the other United States representatives in SCAP (Supreme Commander for the Allied Powers) and by overwhelming public pressure and voted in elections in 1946 and 1947 ordered by SCAP [R. 70, 74-75; Pltf. Ex. 5, pp. 4-9; Pltf. Ex. 6; Pltf. Ex. 2, pp. 24-26, 136].

Petitioner's case is unique, however, in that she alone, of all the cases that have been tried[1] and which have involved facts and circumstances so identical as to be substantially the same, has had a court decree that she lost her American citizenship.

Hence the appeal to this court.

[1] *Arikawa-Tsunashima v. Acheson* (D. C., S. D. Calif.), 83 Fed. Supp. 473;
Ouye v. Acheson (D. C., D. Haw.), 91 Fed. Supp. 129;
Yonemura v. Acheson, No. 965 (D. C., D. Haw.), Unreported;
Yamamoto v. Acheson (D. C., D. Ariz.), 93 Fed. Supp. 346;
Furuno v. Acheson (D. C., S. D. Calif.), 94 Fed. Supp. 868;
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Henry Yada v. Acheson (D. C., S. D. Calif., No. 1008-SD) Unreported;
Nakashima v. Acheson (D. C., S. D. Calif.), 98 Fed. Supp. 11.

Plaintiff was born in Seattle, Washington, on July 2, 1916 [R. 49]. When she was 3 years old she was taken by her parents to Japan [R. 54]. Her parents returned to the United States after 7 months [R. 54] and left petitioner with relatives so that petitioner might receive an education in Japan [R. 55]. Petitioner's brother returned to the United States [R. 55] and later served in the Army of the United States for 4 years [R. 51]. In 1940 petitioner returned to the United States intending to remain permanently [R. 57]. In 1941, during the summer vacation [R. 58] her aunt begged her to return to Japan for a final visit before her permanent settlement in the United States [R. 74]. When she tried to return to Seattle, she was not permitted so to do by the Japanese militarists [R. 74], and she was detained in Japan throughout the war [R. 74].

After the war General MacArthur, as SCAP, took over complete control of the country and administered it, down to the last detail [Pltf. Ex. 2], in order to carry out the "objectives of the United States" [Pltf. Ex. 2, p. 10]. For the first time in the history of Japan, still under orders from General MacArthur, women were permitted to vote [R. 74; Pltf. Ex. 2, p. 25]. On January 12, 1946, SCAP ordered that the first post-war elections be held [Pltf. Ex. 2, pp. 24-25]. A tremendous and studied (properly so, of course) program was instituted and successfully carried out by SCAP for the very purpose of inducing all persons to vote [R. 75; Pltf. Ex. 5, pp. 4-9], especially the women [Pltf. Ex. 6].

Under this overwhelming pressure from SCAP, who, petitioner thought, represented President Truman [R. 98], and not knowing that she might lose her United States citizenship [R. 31], but on the contrary believing that she

was doing what this country wanted her to do [R. 30], petitioner voted, because, and there is no controversy of fact on this, she thought "it was absolutely essential" [R. 75] and because the repeated emphasis by the occupation forces made her believe that it was her "duty to vote" [R. 70]. Petitioner did not vote in later similar elections in Japan because by then she had learned that by so doing she might lose her American citizenship [R. 69].

Under this state of facts, the lower court, contrary to the trial court, held that the terrible punishment of loss of citizenship should be visited upon petitioner.

Reasons for Granting the Writ.

1. The question of the constitutionality of the statute involved is of great importance, not only to the petitioner here, but to the entire administration of justice on the question of loss of citizenship. The precise statute involved has been declared unconstitutional by the United States District Court for the District of Hawaii in *Okimura v. Acheson*, 99 Fed. Supp. 587. That case, together with *Murata v. Acheson*, 99 Fed. Supp. 591 (holding unconstitutional the related section, 8 U. S. C. 801(c)), are presently before this court on direct appeal. (*Acheson v. Okimura*, No. 421, Oct. Term 1951, and *Acheson v. Murata*, No. 422, Oct. Term, 1951.) Despite the fact that petitioner raised and argued the constitutional point in the court below, the failure of that court to discuss the point, and its holding adjudging that petitioner lost her citizenship, can only be considered a holding that the statute is constitutional and therefore in direct conflict with the *Okimura* and *Murata* decisions now before this court.

In addition there is pending in this court the case of *Kawakita v. United States* No. 220, Misc., Oct. Term, 1951. This latter case is here on certiorari from the same court below. In that case the court below held that petitioner did *not* lose his United States citizenship despite an intent so to lose it. In the case at bar the court below held that petitioner *did* lose her United States citizenship despite an intent not to do so and in the face of an inducement by this government akin to, if not technically identical with, entrapment.

To settle the conflict between the case at bar and the *Okimura* and *Murata* cases and to clarify the confusion between the *Kawakita* case and the case at bar, review of this court is needed.

2. The court below has decided important questions of federal law which have not been, but which should be decided by this court, namely:

a. What kind of an election is within the meaning and intent of 8 U. S. C. 801(e) to the effect that a native born United States citizen shall lose his citizenship by voting in a political election (in a foreign state). That is, whether an election conducted by orders and under the supervision of the representative of the United States (SCAP), the results of which could be set aside by him if they did not please him [Pltf. Ex. 2, pp. 25-26] is the "political election" intended by congress;

b. Whether a territory over which the United States has complete power and control and over which that power and control is administered down to the last detail, including the changing and promulgation of a new constitution and laws [Pltf. Ex. 2], is a foreign state within the meaning and intent of 8 U. S. C. 801(e). That is, whether

Congress intended that a United States citizen should lose his precious heritage of citizenship when he voted at the behest of Americans in Japan for purposes to carry out the objectives of the United States.

3. The lower court has decided questions of federal law probably in conflict with applicable decisions of this court, namely:

a. The decision of the lower court is in conflict with the intent, meaning and language of the decision in *Moser v. United States,* 341 U. S. 41. Whereas in the case just cited, this court held that one will not be deprived of his rights to citizenship unless he "knowingly and intentionally" waived them and that "nothing less than an intentional waiver is required by elementary fairness," the court below in the instant case held that "the fact, if it be a fact, that (petitioner) did not intend to lose her nationality and did not know that she would lose it if she voted in these elections is immaterial" [R. 137]. In relying on *Savorgnan v. United States,* 338 U. S. 491, as authority for its position, the lower court failed to heed the words of this court in *Moser* in discussing *Savorgnan*; that in *Savorgnan,* petitioner "sign(ed) one thing and claim(ed) another." It seems manifest that this court in *Moser* indicated that the *Savorgnan* decision is not to be given the strict and literal interpretation attributed to it by the court below. To dispel the confusion thus cast upon the problem review of the instant case should be granted.

b. The decision of the court below is contrary to *Mackenzie v. Hare,* 239 U. S. 299, which holds "that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen." (239 U. S. at 311.) And it is also in conflict with the decision of the Court of Appeals for the District of Columbia in

Lapides v. Clark, 176 F. 2d 619, 621, cert. den. 338 U. S. 860, reh. den. 338 U. S. 888, where that court held, in referring to expatriation.

> "It deals with a condition voluntarily brought about by one's own acts, *with notice of the consequences. In that sense that is a concurrence by the citizen.*" (Italics added.)

Manifestly there was no "concurrence of the citizen" nor any "notice of the consequences" in the case at bar. Indeed when petitioner did have notice of the consequences (loss of citizenship if she voted in the 1948 elections), *she did not vote—precisely because of such notice* [R. 69].

Furthermore, the decision of the lower court is in conflict with its own decision in *Acheson v. Murakami,* 176 F. 2d 953, where it held that before there could be loss of citizenship, there must be a "free and intelligent choice" (p. 954).

c. The decisions of the court below on whether petitioner's action was voluntary are in conflict with the meaning and intent of this court's decision in *Watts v. Indiana,* 338 U. S. 49, which holds that there need not be physical force in order to render one's action involuntary and it is also in conflict with the meaning and intent of cases like *The Eliza Lines,* 199 U. S. 119; *Union Pac. Ry. Co. v. Public Service Commission,* 248 U. S. 67, and *Altvater v. Freeman,* 319 U. S. 359, which hold that compulsion may actually exist so as to make one's action involuntary despite the appearance of freedom of choice.

In reversing the trial court, despite the latter's opportunity to observe the petitioner under oath on the witness

stand, the lower court failed to apprehend or give account to the tremendous pressures prevailing in Japan and at work upon petitioner; pressures which were the result of our own American representatives; pressures which petitioner could not resist. In so doing, the court below adopted a definition of voluntary conduct which is clearly at variance with the above decisions of this court as well as with the dictionary meaning of the word.

But even if it be felt that the cited decisions are not applicable to the situation at bar, review of this case should be granted to correct an obvious injustice. No such result as reached by the lower court on the facts of this case could possibly be intended by Congress when it passed the act. Nor can the decision stand the test of weight on the scales of justice. As suggested above, if this be not a case of actual technical entrapment, it is so closely akin to it, that in the interest of justice, the decision should not be permitted to stand. At the very least, review to consider this question should be granted.

4. Review by this court is necessary because of the importance of securing an interpretation of the section in the administration of cases from countries other than Japan where similar problems have arisen. See, for example, the decision of the United States District Court of the District of Columbia in *Wohlmuth v. Acheson,* No. C. A. 520-50 (Nov. 10, 1950) (on appeal) holding that for the purposes of the statute an election in post-war Germany was not an election in a foreign state. (Accord, *Brehm v. Acheson,* 96 Fed. Supp. 662.)

ARGUMENT.

I.

Title 8, United States Code, Section 801(e) Is Unconstitutional.

The argument as to unconstitutionality is very simple and, it is submitted, manifestly correct. It is this: A native born citizen such as petitioner here is a citizen of the United States not by act or grace of Congress but by the mandatory command of the Constitution (the 14th Amendment). The right to citizenship being petitioner's by reason of the Constitution, Congress has no more power to take away that right any more than it would have the power to take away the right to counsel or to trial by jury.

The question of waiver or consent to the loss of a constitutional right is, of course, another question. But it is Hornbook law that before one can waive a fundamental right, especially one bottomed in the Constitution, it must be an intelligent and knowing and consented to waiver. This court has made it clear that it will stand for nothing less, and every reasonable presumption is indulged in *against* the waiver. (*Glasser v. United States,* 315 U. S. 60, 71; *Adams v. United States, ex rel McCann,* 317 U. S. 269; *Von Moltke v. Gillies,* 332 U. S. 708; *Johnson v. Zerbst,* 304 U. S. 458, 464.) Specifically in connection with loss of citizenship rights, this court has held that "nothing less than an intelligent waiver" will suffice. (*Moser v. United States,* 341 U. S. at 41.)

Therefore, just as it would be patently unconstitutional for *Congress* to say that one who pleads guilty (even voluntarily) to an offense, shall thereby lose his right to counsel (*Rice v. Olson,* 324 U. S. 786), so also is it patently unconstitutional for *Congress* to have said that a native born American citizen who votes in a political election in a foreign state shall thereby cease to be an American citizen, even though he votes voluntarily.

Aside from a knowing and consented to waiver of the right to citizenship (the right of expatriation declared as a part of our public policy in 8 U. S. C. 800), *Congress simply has no power to take that citizenship away.*[2] In other words, what the Constitution gives, Congress cannot take away. (Compare Justice Frankfurter in *American Communications Assoc. v. Douds,* 339 U. S. 382, 419: "no matter what its notions of policy may be, the Eighth Amendment, for example, bars Congress from inflicting 'cruel and unusual punishments.' ")

There is ample authority for this reasoning.

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[2]The question as to whether Congress has this power over naturalized citizens is not involved in this case and need not detain us. Clearly a different question is presented. The Constitution (Art. I, Sec. 8, Cl. 4) specifically gives Congress power over naturalization. This power is expressly lacking over native born citizenship. Having the power over naturalization, Congress may perhaps, so long as not arbitrary, impose conditions on the continuation of the grant of citizenship. That there may be a difference between native born and naturalized citizens, see *Lapides v. Clark,* 176 F. 2d 619, cert. den. 338 U. S. 860, reh. den. 338 U. S. 88.

In *United States v. Wong Kim Ark,* 169 U. S. 649, 703, this court said:

> "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

In *Dos Reis v. Nicolls,* 161 F. 2d 860 (C. C. A. 1, 1947), the court indicated its doubts as to the constitutionality of the law (there it was 8 U. S. C. 801(c)) but did not reach the point because it held that in any event there was no loss of citizenship if the person acted involuntarily and that in that case the action was involuntary.

In *MacKenzie v. Hare,* 239 U. S. 299, 311, 312, it was pointed out

> "that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen" and "with(out) notice of the consequences." (See also, *Lapides v. Clark, supra,* 176 F. 2d 619, 621.)

Although Congress has declared, as the public policy of this nation, the "right" of expatriation (8 U. S. C. 800), it is clear that unless the United States gives consent, a citizen cannot expatriate himself, even though he want to and do all in his power so to do. (See, *e. g.,* 8 U. S. C. 803.) Ample authority supports this principle.[3] The

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[3]Getty, *The Law of Citizenship in the United States* (Univ. of Chicago Press, 1934); Slaymaker, *The Right of the American Citizen to Expatriate,* 37 Am. L. Rev. 191, 192; Moore, *A Hundred Years of American Diplomacy,* 14 H. L. R. 165, 179; *Stranks v. Dupont,* 3 Pet. (U. S.) 241, 245; *Murray v. The Schooner Charming Betsy,* 2 Cranch (U. S.) 64, 120.

most recent and dramatic example is the enactment of 8 U. S. C. 801(i) in 1944 (chap. 368, sec. 1, 58 Stat. 677) to permit the Japanese evacuees at Tule Lake to renounce. See *Acheson v. Murakami,* 176 F. 2d 953, 962 (C. C. A. 9, 1949) (Finding 19).

Therefore, it is clear that citizenship is a relationship between the citizen and the sovereign which is *insoluble* without the concurrence of *both.* This was long ago recognized in an early Massachusetts case:

> "Protection and allegiance are reciprocal. The sovereign cannot refuse his protection to any subject, *nor discharge him from his allegiance against his consent;* and he will remain a subject, unless disfranchised as a punishment for some crime." (Italics added.)
>
> *Ainslee v. Martin,* 9 Mass. 454.

In other words, citizenship, at least as to a native-born 14th Amendment citizen, is a two-way highway, not a one-way street. Congress, in legislating away petitioner's citizenship without her concurrence or consent, has broken the rules of the road.

The latest authority, of course, are the decisions, now here for review, as pointed out above, of the District Court for the District of Hawaii holding *squarely* the precise statute here in question to be unconstitutional as beyond the powers of Congress (*Okimura v. Acheson,* No. 421, Oct. Term, 1951, and *Murata v. Acheson,* No. 422, Oct. Term, 1951). It is submitted that these decisions are correct and should be followed here.

II.

The Elections in Which Petitioner Voted in Japan in 1946 and 1947 Were Not Political Elections Within the Meaning of 8 U. S. C. 801(e).

Of course, if the elections in which petitioner voted were not political elections within the meaning of 8 U. S. C. 801(e), one of the elements required by the statute was not present and accordingly no loss of citizenship resulted.

The trial court made express findings as to the nature of the elections [R. 41-43] and discussed the question in its opinion [R. 21, 22]. The court below dismissed this result (concurred in by some 9 District Court cases) by simply indicating that the reasoning in two other District Court cases was more persuasive to it [R. 132, 133].

It is submitted that the reasoning and holding of the trial court is correct. The facts[4] are ample to support the findings and the law is clear in support of the conclusion.

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[4]There were lodged with the clerk of the court below and there were or will be forwarded to the clerk of this court for this court's use, a number of documents of the contents of which, judicial notice may be taken. These documents are the following:

1. Selected Data on the Occupation of Japan, official publication of Supreme Commander for the Allied Powers (SCAP), 1950.
2. Political Reorientation of Japan (2 Vols.). Official Report of Government Section, SCAP (1950).
3. Extracts from No. 17, Summation of Non-Military Activities in Japan (SCAP, February, 1947).
4. Extract from Unclassified State Department document dated May 5, 1950, subject: Material regarding Japanese elections, from Yokohama to the Department.
5. Deposition of Justin Williams, Chief of the Parliamentary and Political Division of Government Section, SCAP.
6. Extract from Deposition of Kiyoshi Togasaki, editor of the Nippon Times, English language paper published in Tokyo.

(Continued on following pages)

On January 12, 1946, General MacArthur, through his Adjutant General, ordered the holding of the elections [Pltf. Ex. 2, pp. 25, 136]. The elections could only be held if, when and in accordance with the wishes of SCAP [*Ibid,* pp. 25, 138]. And if the *results* were not satisfactory to SCAP, he could order the elections set aside and new elections held [*Ibid,* pp. 25, 139]. In his statement *approving* the results of the elections, General MacArthur pointed out that one of the main reasons the directive ordering the election was issued was "to evaluate political thinking of the Japanese people" [*Ibid,* 142].

Some or all of the documents referred to above, depending upon their availability at the time of trial, were introduced and received in evidence in numerous cases, involving the issues of this case. The following are cases in the United States District Court for the Southern District of California wherein they were received and are a part of the records of these cases:

Furuno v. Acheson, 94 Fed. Supp. 358;
Kai v. Acheson, 94 Fed. Supp. 383;
Rokui v. Acheson, 94 Fed. Supp. 439;
Seki v. Acheson, 94 Fed. Supp. 438;
Yada v. Acheson, 94 Fed. Supp. 438;
Kuwahara v. Acheson, 96 Fed. Supp. 38.

As to the official publication of SCAP and the official communique from the Yokohama office to the Department, numbers 1 through 4 above, it is clear that this court may take judicial notice of their contents by reason of that fact alone. As to the depositions, items 5 and 6, they being part of the records of district courts within the circuit of the court below (and having been admitted in evidence without objection; the Williams deposition indeed being taken by the Government) notice may be taken thereof as well. These principles are substantiated in the following cases.

N. L. R. B. v. E. C. Atkins Co., 331 U. S. 398, 406, where this court took judicial notice of the contents of a circular issued by Headquarters, Army Service Forces. The court said:

"Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military au-

On these facts the trial court concluded that:

> "The elections conducted in Japan in 1946 and 1947 where polls, in that they were merely expressions of the desires or wishes of the Japanese people, but not the exercise of a command by then that certain candidates for office shall hold public office; nor were said elections a command by the Japanese people which they were capable of enforcing that certain persons should hold certain public offices."

and he held, therefore, that the elections were not political elections within the meaning of 8 U. S. C. 801(e).

In this holding the trial court and not the court below is sustained by law and reason.

It is to be noted that the statute itself distinguishes between a political election and a plebiscite.

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thorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co. v. Johnson,* 316 U. S. 481, 483, 484."

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 375, where the court took judicial notice of a practice in the administrative office of the United States courts; *Tempel v. United States,* 248 U. S. 121, 126, where the court took judicial notice of the contents of reports of the Secretary of War. In *Standard Oil Co. v. Johnson,* 316 U. S. 481, 483, 484, the court took judicial notice of an order of Army Headquarters establishing post exchanges.

That this is the view of the Government is seen from its brief in *Hirabayashi v. United States,* 320 U. S. 81, where at page 11 it is said that "facts (appearing) in official documents . . . are peculiarly within the realm of judicial notice" citing many cases. Respondent in this case is in accord. (Appellant's Brief, page 23, below.)

See also as to the right to notice the facts revealed by the records of the District Court: *Savage v. U. S. District Court,* 144 F. 2d 575 (C. C. A. 9, 1944); *Armstrong v. Alliance Trust Co.,* 126 F. 2d 164, 167 (C. C. A. 5, 1942). And compare *Falbo v. United States,* 320 U. S. 549, footnote 7.

And it has been held that voting in Canada pursuant to an Act of Canadian Parliament as to whether Canada should join in with the United States in World War I was, because there was no finality, not a political election but a mere plebiscite. And it being not for the purpose of determining sovereignty over foreign territory, an American citizen who voted therein did not lose his citizenship. (*Matter of H,* 1 Administrative Decisions under Immigration and Nationality Laws of the United States 239, cited I & N).

Not only did the trial court hold that the elections were "merely the expression of a wish, or at best, merely a plebiscite" [R. 22], but Dr. Justin Williams, Chief of the Political Division, Government Section of SCAP, used the same language. Thus he said in describing the elections:

> "In this case, it was an expression of public opinion." [Williams Deposition 23.]

And again [p. 29]:

> "The election was intended to be, among other things, a plebiscite."

The similarity in language used by the trial court and Dr. Williams is striking because the deposition was not known to the court. It was simply a case of the facts clearly calling for such description.

Both the trial court and Dr. Williams are supported by authority.

In *Newberry v. United States,* 256 U. S. 232, 249, the court said:

> ". . . the word (election) now has the same general significance as it did when the Constitution came into existence,—*final* choice of an officer by the duly qualified electors." (Italics added.)

In accord is *Commonwealth v. Likely,* 267 Pa. 310, 110 Atl. 167:

> "An election is the embodiment of the popular will, the expression of the *sovereign power of the people.*" (Italics added.)

And compare this principle from *Matter of H,* 1 I & N, 239, 242:

> "Judicial and legalistic definitions of the term 'election' uniformly emphasize as essential the element of *determinateness* . . .
>
> "The basic essential of an election in our governmental procedure is thus, *its finality of decisiveness*—until the next election." (Italics added.)

In view of General MacArthur's admitted power to set aside the whole proceeding [Pltf. Ex. 2, pp. 138-140] even in the view of the Department of Justice (*Matter of H*), the "elections" in Japan cannot be considered to have been the kind of elections that were within the contemplation of Congress.

The conclusion here argued for becomes even more obvious when it is considered that expatriation laws, being highly penal, must be strictly construed (*In re Wildberger,* 214 Fed. 508, 509 (D. C. Ed. Pa. 1914). *Cf. Perkins v. Elg,* 307 U. S. 325, 337; *Schneiderman v. United States,* 320 U. S. 120).

III.

At the Time of the Elections in 1946 and 1947, Japan Was Not a Foreign State Within the Meaning of 8 U. S. C. 801(e).

Here again if Japan at the time of the elections involved was not a foreign state within the meaning of the act, one of the essential elements is missing, petitioner cannot be held to have expatriated herself and the lower court's judgment must be reversed.

The opinion of the lower court spends little time on the question [R. 132]. The trial court, however, made extensive findings [R. 31-42] as to the nature of Japan and its administration by General MacArthur to further the objectives of the United States.

It is submitted that one simply cannot read the material [Pltf. Exs. 2, 5 and 6 and the documents mentioned in footnote 4, *supra*, pp. 15 to 17; all, with the exception of the Togasaki deposition, of United States Government origin and about which there is no conflict] without coming to the conclusion that the Japan of 1946 and 1947 where petitioner voted was simply not, it just could not be, the kind of a place Congress intended when it used the phrase "foreign state."

This conclusion is supported by applicable law.

> "Thus in 1 Moore, *Digest of International Law*, 12 *et seq.*, is found this definition from 1 Phillimore, 3d Ed. *International Law*, p. 47:
>
> "For all purposes of international law, a state may be defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising through the medium of an organized government, in-

dependent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other communities of the globe."

It quickly becomes apparent that Japan in 1946 and 1947 did not fit this definition. For example, it cannot be said that it exercised *independent sovereignty,* nor that it was capable of making war and peace, nor that it was able to enter into all international relations with the other communities of the globe.

The Japanese Government had no independence. What it did or did not do was solely controlled by SCAP in order to carry out the objectives of the United States [Pltf. Ex. 2, p. 74].

". . . to permit the Japanese Government to continue official relations with other governments through its diplomatic and consular representatives abroad and through foreign representatives in Japan would have been inconsistent with Japan's position as a defeated and occupied power and incompatible with the Supreme Commander's authority . . ." (SCAP, Political Reorientation of Japan, 1.)

"From any objective point of view there should have been no further question that the relations of the Allies with Japan rested on an unconditional surrender, not on a contract . . ." (*Ibid.*, 5.)

"The authority given to the Supreme Commander to carry out his mission under Allied policy directives was supreme and clearly not subject to question on the part of the Japanese as to its scope. True, he was instructed to exercise control of Japan through the

Japanese Government to the extent that this proved satisfactory for his purpose, but this did not prejudice his right to act directly, or to use force, if necessary . . . " (*Ibid.*, 5.)

"By the end of December, 1945, the Japanese Government had no relations with the outside world except through the Supreme Commander, and arrangements were being made for the repatriation of Japanese representatives in foreign countries." (*Ibid.*, 7.)

Indeed, even the United States representatives in Japan were a part of SCAP and had no relationship with the Japanese Government (Selected Data, 164).

Similarly does this definition from 1 Hackworth, *Digest of International Law* 47, sustain petitioner's position:

"The term state . . . connotes, in the international sense, a people permanently occupying a fixed territory, bound together by common laws and customs into a body politic, possessing an organized government, and *capable of conducting relations with other states.*" (Italics added.)

And compare this definition to which the United States has agreed at the convention between the United States of America and other American Republics on the Rights and Duties of States, signed at Montevideo, Uruguay, on December 26, 1933 (49 Stat. 3097; Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, Vol. 4, p. 4807):

(Article I): "the state as a person of international law should possess the following qualifications:

> (a) a permanent population; (b) a defined territory; (c) government, and (d) *capacity to enter into relations with other states.*" (Italics added.)

It is thus clear that Japan under the occupation in 1946 and 1947 did not measure up to the required standards.

What the authorities just quoted have stated to be the law has also been so stated by this court in *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 L. Ed. 25, 31:

> "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them would be considered by all as an invasion of our territory, and an act of hostility."

There is other authority to like effect. For example, on the issue of foreign state it has been held that the Philippine Islands was not a "foreign country" (*Dant & Russell v. Board of Supervisors of L. A. County,* 21 Cal. 2d 534 (1943). In *The Lucy H.* 235 Fed. 610, 614 (D. C. N. D., Fla., 1916), it was held that "a 'state or nation' denotes a political community organized under a distinct government *recognized and conformed to by its citizens and subjects as the supreme power.*" (Citing *The Three Friends,* 166 U. S. 54.) (Italics added.)

Stressing the need for sovereignty is the case of *Spelor v. United States,* 171 F. 2d 208, 210 (C. A. 2, 1948).

Compare General MacArthur's testimony before the Senate Foreign Relations and Armed Services Committee on May 3, 1951:

> "For five years and a half, *I have had to govern Japan.* I was provided, by the nations concerned—*I—as the sole executive authority for Japan . . .*" (Italics added.) (L. A. Times, May 4, 1951, p. 3, col. 3.)

The situation in Japan at the time involved was not the usual case of a mere military occupation. If it had been just that, a different problem might arise. But it was much more. The United States, in fact, became Japan and we made over that land in accordance with our wishes and to support the objectives of this country [Plf. Ex. 2, p. 74]. In the words of the trial court, "they just practically clean out the entire Japanese Government" (p. 19).

The usual role of a military occupant is described in II Oppenheim, International Law (6th Ed. 1944), Section 166, page 342.

> "But, although as regards the safety of his army and the purpose of war the *occupant* is vested with an almost absolute power, *as he is not the sovereign of the territory he has no right to make changes in the laws or in the administration,* other than those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realization of the purpose of the war. *On the contrary, he has the duty of administering the country according to the existing laws and he must insure public order and safety; must respect family honor and rights, individual lives, private property, religious convictions, and liberty.*" (Italics added.)

To say that our occupation forces made no changes in the laws or in the administration, or to say that General MacArthur administered the country according to the existing laws, or that private property or religious convictions were respected in the sense that the above quote is meant, is simply to ignore that which is obvious and that which the State Department has publicly, and properly of course, announced has been done.

Thus, for example, and with no attempt to be exhaustive, at least these changes were wrought in Japan by directive [Pltf. Ex. 2, pp. 15, 16] of the Supreme Commander all for the purpose of carrying out United States' Objectives in Japan [Pltf. Ex. 2, p. 54; Selected Data, 17]:

1. SCAP directive ordered the establishment of a Japanese "Bill of Rights" in order to remove restrictions on political, civil and religious liberties and discriminations on the grounds of race, nationality, creed or political opinion [Pltf. Ex. 2, pp. 19, 94-980].

2. Undesirable persons were removed from public office and over 200 political parties, associations, societies and other organizations were ordered abolished [Pltf. Ex. 2, pp. 12, 20, 99-112; Selected Data, 80].

3. SCAP directed as to how large the internal police force could be [Pltf. Ex. 2, p. 99].

4. SCAP directed a "liberalization of the constitution" which in effect amounted to the promulgation of a new constitution for Japan [Pltf. Ex. 2, pp. 20, 21] which had to be first approved by the Supreme Commander before it was even published to the people [Pltf. Ex. 2, pp. 21, 132].

5. SCAP ordered the 1946 and 1947 elections to be held [Pltf. Ex. 2, pp. 25, 136; Williams Depositions, 22] with power to set them aside if he did not approve [Pltf. Ex. 2, p. 139] and which had to be and were approved by him before they were valid [Pltf. Ex. 2, p. 140; Selected Data, 1] and the candidates in which had first to be approved by SCAP [Pltf. Ex. 6, p. 9].

6. SCAP forbade the domestic use of silk or silk-mixed goods and rescinded the Japanese Government's order *re* reduction of the silk crop [Pltf. Ex. 2, p. 39].

7. SCAP issued directives encouraging the growth of labor unions [Pltf. Ex. 2, p. 44; Selected Data, 71].

8. SCAP initiated a complete land reform program designed to improve the economic and social status of farmers (Selected Data, 42).

9. SCAP permits Japan to maintain no air service (Selected Data, 65).

10. The entire business and economic system of Japan has been reorganized by SCAP (Selected Data, 69).

11. Radio services are operated only under a code promulgated by SCAP (Selected Data, 75, 76).

The above recitals represent only some of the things SCAP has done publicly which show that this is not a mere military occupation.

To say that this land where the United States did these things was a foreign state within the meaning of 8 U. S. C. 801(e) to deprive petitioner of her citizenship is, it is submitted, unwarranted, unsound and an inappropriate interpretation of the statute.

IV.

Petitioner Did Not Act Voluntarily and Therefore Cannot Be Adjudged to Have Lost Her United States Citizenship.

It is, of course, the law that if one performs an act involuntarily, which, had it been voluntary would result in loss of citizenship, no loss of citizenship is effected. (*Perkins v. Elg,* 307 U. S. 325, 334; *Dos Reis v. Nicolls,* 161 F. 2d 860, 868.) The lower court recognized this, but held that the trial court, who had observed the petitioner on the stand, under oath and was thus in a position to judge the effects of conditions in Japan on *this* petitioner, was "clearly erroneous" when it found that petitioner had acted involuntarily [R. 136]. It is submitted that in so holding, the lower court acted contrary to the mandate of Rule 52a, Federal Rules of Civil Procedure. On this finding of fact, respondent here, appellant below, failed to make a "very obvious and exceptional showing of error." (*Graver Mfg. Co. v. Linde Co.,* 336 U. S. 271, 275.) Not having done so, the trial court's judgment on this fact issue should not have been reversed.

The solution of this problem requires an appreciation that what may be "voluntary" to one person, may, under precise circumstances, be "involuntary" as to another person. The solution of the problem also requires an apprehension that human beings are social creatures and that oft-times, to certain persons—for example, petitioner —social pressures are overwhelming and cannot be denied. There must also be taken into consideration that a judgment of loss of United States citizenship is a deprivation of the most precious possession man today has. Accordingly, *all* the surrounding circumstances, including their effect on this petitioner—which only the trial court could

judge—must be taken into account. This, the lower court failed to do.

This court has recognized the precious right of our citizenship and that it may not be "lightly revoked." (*Schneiderman v. United States,* 320 U. S. 120, 125.) Also this court has said "Rights of citizenship may not be impaired by an ambiguity." (*Perkins v. Elg,* 307 U. S. 325, 337.)

Accordingly, a consideration of why petitioner voted and the social setting—the gestalt—in which she found herself, is in order.

Prior to the occupation of Japan, women were not allowed to vote at all [R. 70, Pltf. Ex. 5, Sec. 30], and the voting age for men was 25 [Pltf. Ex. 5, Sec. 30; Williams Deposition, 14]. This was changed by directive of General MacArthur. For the first time in the history of Japan women were permitted to vote [R. 70, Pltf. Ex. 2, pp. 25, 26] and the voting age was lowered to 20 [Pltf. Ex. 2, p. 25; Williams Deposition, 14]. Thus, were it not for this order of SCAP, petitioner would not have even been in a position to vote. The situation was such that the minds of the inhabitants, including petitioner were adjusted to the realization that the occupation authorities were all-powerful and to displease them would result in grave consequences.

On January 12, 1946, General MacArthur, through his Adjutant General, issued the directive ordering the first election [Pltf. Ex. 2, pp. 25, 136].

Prior to the general elections of April 10, 1946, authorized agencies of the Headquarters encouraged the Japanese press, radio and other information dissemination media to encourage election participation by eligible voters.

In pre-election reports the press emphasized the election's importance and the imperative need for participation by all voters and declared that the world was watching the Japanese election and that those who refrained from voting were "enemies of the people." (Political Reorientation, 370.)

A clear picture of the intensive program carried out by the occupation forces to stimulate participation in the election is seen.

The United States Military Government throughout the country used the press and published open letters designed to stimulate and induce the people to vote. Typical is this release by Lt. Col. Timothy J. Ryan, Commander of the Saitama Military Government Team:

> "The voters have no right to delegate their power of selection to any small group. If they do this, they are failing to meet their obligations and deserve what may befall them, non-representative government. Let every man and woman who has the vote, exercise that right and make the coming election a truly democratic one." (Political Reorientation, 372.)

The occupation forces closely surveilled the election by the use of military government teams at practically every polling place in Japan and that they would so do was widely publicized [Pltf. Ex. 5, Secs. 21, 23, 24; Williams Deposition, 6, 17].

The emphasis everywhere was that everyone must vote; it was an all-out campaign on all fronts [Political Reorientation, 374, 376; Togasaki Deposition, 1, 3, 4]. Special attention was given to the women [Pltf. Ex. 6]. No distinction was made between Nisei or Issei [May 5,

1950, State Dept. Document, 1, 2; Williams Deposition, 21; Togasaki Deposition, 5]. Indeed it was not until a few days before the 1947 elections that any notification of any sort was issued by the occupation forces that Nisei should not vote because of the danger that they might lose their United States citizenship [May 5, 1950, State Department Document 1 and enclosures]. And, significantly, when petitioner learned of this, she no longer voted [R. 69].

It is against this background of social pressure brought about by the occupation forces on people who had been enslaved for 300 years [Pltf. Exs. 2, 26] that petitioner's actions must be viewed. Her reasons as to why she voted are lucid:

> "After the war ended, General MacArthur and the occupational forces had granted the women in Japan for voting; and to vote I thought it would help the cause of democracy in Japan. It was repeated and emphasized again and again by the occupation forces, and therefore I thought it was my duty to vote." [R. 70.]

In a statement given to the American Consul in Japan, she said:

> "After the termination of war, here, in Japan, there came into effect the Women's Suffrage through which the women were given the chance to participate in the democratic future of Japan and, at the time of the elections, I constantly read much in the newspapers and other publications in addition to election guidance programs over the radio, that were sponsored by the Central Government of Japan and Occupational Authorities from the offices of the Supreme Commander, Eighth Army, and Military Gov-

ernments, that it was absolutely essential that every woman of voting age in Japan should turn out at the pools (*sic*) thereby positively asserting themselves as voters and exponents of democracy. So I, in total ignorance of the existence of the Nationality Act, but with a view toward exercising my ideas with respect to democratic practices, voted in the same way as the Japanese women citizens, not realizing for a moment that by so doing, I was in effect, relinquishing my American citizenship. It was only through the so convincing approach of occupation force voting drives and no talk of we few 'orphan Americans' or instructions to us, that prompted me to participate in the great democratic spirit which engulfed everyone at the time." [R. 74 and 75.]

The following also appears in the record [R. 90]:

"The Court: Did you discuss it with your aunt? The Witness (Through the interpreter: They accented that since we women had a right to vote that we should vote. That is about all I talked about it.

The Court: Everyone was talking to everyone else concerning the women voting?

The Witness (Through the interpreter): Yes.

Q. (By Mr. Belcher): Women had not been permitted to vote before that time? A. (Through the interpreter): No, they wasn't."

Again [R. 92]:

"Why did you vote in the local elections?

The Witness (Through the interpreter): Because the occupational forces emphasized to vote."

And [R. 93]:

"Did you hear the appeal that was made by radio to vote? A. (Through the interpreter): Yes, by the radio and by the newspapers.

Q. There was nothing said in any of that radio propaganda that you heard that appealed to Japanese of American birth to vote in those elections, was there? A. (Through the interpreter): No, I didn't hear anything like that.

Q. So that, at the time you voted, you did so as a Japanese citizen, did you not? A. (Through the interpreter): My parents were in America and I have American citizenship but, according to General MacArthur, his instructions were that everybody in Japan should vote; therefore, I thought it was my duty to vote.

The Court: All Japanese?

The Witness (Through the interpreter): Everybody in Japan."

Similarly [R. 95]:

"Therefore, my intention of voting at that time was to help the occupational forces.

Q. Did you know that the occupational forces represented eleven nations? A. (Through the interpreter): I thought it was only America."

At the polling place, petitioner saw American soldiers [R. 97].

To petitioner, General MacArthur meant the person who brought peace to Japan and who represents President Truman [R. 98].

A. What Is "Voluntary?"

Because of the delicacy of the problem, much has been said by this and other courts. It is submitted that the lower court's holding as "clearly erroneous" the trial court's finding of involuntariness is itself a grievous error. In so doing the lower court failed to apprehend the tremendous pressures extant at the time and their effect on this petitioner. The trial court observed petitioner; the lower court did not.

It is submitted that the lower court's ruling is inconsistent with the decisions of this court bearing on the point; as well, indeed as with other decisions of the lower court itself.

Thus in *Acheson v. Murakami,* 176 F. 2d 953, 955, the lower court properly recognized situations short of fear of physical injury as appropriate factors contributing to making an alleged expatriation involuntary. The court there apprehended that pressures exerted by this Government, upon the minds of Americans of Japanese descent, contributed to a totality of facts, in the context of which, abandonment of United States citizenship was involuntary. In the instant case, the lower court ignored the pressures exerted by the United States, through United States Occupation troops, upon the petitioner—pressures found by the trial court to have induced the plaintiff involuntarily to vote [R. 30].

Ignoring these pressures, the lower court decided the instant case in a "judicial vacuum"[5] and in conflict with the application of judicial realism by the court in *Murakami.*

It is noteworthy that in *every* instance, where the trial courts have observed the plaintiffs their decisions were at variance with that of the lower court whose decision on this fact question is necessarily based on the cold written record. Thus in a case decided *after* the decision of the lower court in the instant case and with knowledge of the decision, one of the very judges on whom the lower court relied for its holding on the "political election" and "foreign state" issues came to the conclusion that the plaintiffs in that case had voted involuntarily. In *Nakashima v. Acheson,* 98 Fed. Supp. 11, Judge Byrne, who had decided the *Kuwahara* case, 96 Fed. Supp. 38, said:

> "Here the plaintiff voted because she feared the result if she refrained from voting. The occupation authorities were bringing intense pressure on the Japanese people in a laudable effort to induce them to participate in the democratic process and to exercise their right of suffrage."

The trial judge there, upon evidence substantially similar to that in the instant case, could not close his eyes to the role of the United States Government in the Japanese elections, the pressures exerted by the Occupation

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[5]The phrase is not ours, it is that of Chief Justice Hughes in *NLRB v. Jones & Laughlin,* 301 U. S. 1.

Forces and the resultant involuntariness of Americans of Japanese descent voting under such pressures. Said Judge Byrne:

> "A voluntary act is an act proceeding from one's own choice or full consent *unimpelled by another's influence*. To determine whether an act is voluntary, the trier of fact must examine all relevant facts and circumstances which might cause the actor to depart from the exercise of free choice and respond to compulsion from others. In these Japanese voting cases, the conditions, as well as the nature of the government existing in Japan at the time, are of great importance. The elections were ordered by General MacArthur under the new law guaranteeing the vote to women. An intensive campaign was conducted by the occupation authorities to stimulate participation in the elections and to encourage all the inhabitants to take part in the democratic process. Those who worked at cross purposes were considered to be in sympathy with the officials who had been purged by the occupation authorities. The radio pronounced that the world was watching the Japanese elections and that those who refrained from voting were enemies of the people." (Italics added.)

And he concluded that under these circumstances, there had been no voluntary conduct. The cases are many, especially since the harsh days of the common law, which have recognized that pressures other than physical, but rather social, moral or psychological, are sufficient to relieve a person of his physical act because of their play

and effect upon his actual free will. That is, that despite the appearance of freedom, the individual actually finds himself in a position where his will is not his own. See, for example: *The Eliza Lines,* 199 U. S. 119, 130-131; *Atchison etc. Ry. v. O'Connor,* 223 U. S. 280; 17 Am. Jur., Duress & Undue Influence, Sec. 7; *Young v. Hoaglund,* 212 Cal. 426.

This court has recognized that under circumstances which in their effect are not unlike those prevailing here, acts performed because of the force of the spirit were not acts that were voluntary. For example, see *Watts v. Indiana,* 338 U. S. 49.[6] It will be recalled that petitioner testified that she voted because of the force of the spirit [R. 82]. The trial court who had the opportunity to observe petitioner, credited this testimony; the lower court, from the cold record, did not.

Webster's New International Dictionary (Unabridged), second edition, 1949, defines "voluntary" as follows:

> "Proceeding from the will, or from one's choice or full consent; produced in or by an act of choice; as, voluntary action.
>
> (2) Unconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself or itself; free . . ."

The facts related above as to the *"gestalt"* of the situation in Japan and petitioner's being engulfed by them

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[6]A good discussion of the meaning of "voluntary" in relation to a case such as this appears in the *Uyeno* decision, 96 Fed. Supp. 510, 517-520.

[R. 95, 93, 92, 90, 75, 74] clearly show that petitioners act was not "unimpelled by another's influence, spontaneous," etc.

It is not suggested, of course, that the action taken by the occupation authorities to induce everyone to vote and the fact that even they failed to realize that they were inducing many American citizens to so do, was improper. On the contrary, the results of the program on the democratization of Japan can only be considered as gratifying. But this does not alter the facts as they existed nor the fact that petitioner's voting was not her free and voluntary choice.

Here, as in the other cases (*e. g., Kuwahara,* 96 Fed. Supp. 38, 43) the petitioner "was caught up in this wave (of occupational pressure) and carried along with it. (S)he voted because (s)he thought (s)he was required[7] to vote and *feared* the result if (s)he disregarded the admonition and urging of the occupation authorities. (Her) action was impelled by the influence of those who (s)he recognized as exercising supreme power and was not voluntary."

So here.

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[7] *Cf.* her testimony that she thought "it was absolutely essential" [R. 75] that she vote and that it was her "duty" [R. 93] to vote.

V.

The Loss of Citizenship Provided for in 8 U. S. C. 801(e) Refers to a Situation Showing a Shift of Allegiance and a Real Attachment to a Foreign Country. It Was Not Intended to Effect Expatriation Where the Citizen Was Acting for This Country and in Furtherance of Its Objectives.

It is clear that at all times petitioner here was not acting at cross purposes to this country nor contrary to the wishes of our occupation forces in Japan. Indeed there is presented in this case the incongruous and paradoxical situation of petitioner doing everything our own representatives asked and wanted her to do and then, by reason thereof, of being visited with the terrible punishment of expatriation and probable permanent separation from her brother and parents.

It would seem manifest that this is not the kind of case Congress had in mind when it passed the legislation. On the contrary, what Congress had in mind was a situation calling for a shift of allegiance—a situation showing that the subject's real attachment is to a foreign country and not to this one.

As reported by the president's Cabinet Committee to Congress in connection with drafting of 801 U. S. C. 801(c), Section 401(c) of the Nationality Act of 1940):

> "None of the various provisions in the Code concerning the loss of American nationality . . . is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their

> own acts, or inaction, *show that their real attachment is to the foreign country and not to the United States.*" (Italics added.) (The foregoing is quoted in *Dos Reis,* 161 F. 2d at page 863.)

The *Dos Reis* case (161 F. 2d at page 863) has a further quotation from the explanatory comment of the president's cabinet committee as follows:

> "This provision is based upon the theory that an American national who, after reaching the age of majority (see proviso (2) to this section, *infra*) *voluntarily* enters, or continues to serve in, the army of a foreign state, *thus offering his all in support of such state, should be deemed to have transferred his allegiance to it.*" (Italics added.)

It is manifest, accordingly, that the critical question is whether the person involved offers his all in support of a foreign state, thus, transferring his allegiance to it.

The same view substantially, is expressed in *Doreau v. Marshall,* 170 F. 2d 721, 724, the test being, as the Third Circuit Court of Appeals pointed out, whether there is an *"authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary, he cannot be truly said to be manifesting his intention of renouncing his country."* (Italics added.)

To the same effect is the following statement by Representative Rees, Chairman of the House Committee, during the course of debate in Congress:

> "Not only do the nationality laws need clarifying and orderly arrangement in a single code, but substantive changes are necessary in connection with certain rights, with a view to preventing persons *who have no real attachment to the United States* from enjoy-

ing the high privilege of American nationality." (Italics added.) (Congressional Record, Vol. 86, 76th Congress, 3rd Session, p. 1, 1948.)

In short, the real question is one of allegiance.

"A change of the allegiance due to the United States, a throwing of it off in the part of a citizen, involves on the part of the government an acquiescence from that department of government which, according to its constitution, must acquiesce in it; *and, on the part of the citizen, the manifestation of the purpose to expatriate* himself by some unequivocal act, which act must also be recognized by the government to be adequate for that purpose." (*Comitis v. Parkerson* (C. C. La. 1893), 56 Fed. 556, 558.) (Italics added.)

The incongruity of visiting punishment upon one like petitioner here for performing an act under the mistaken belief that he is cooperating with this country was recognized in the *Nakashima* case (*supra,* 98 Fed. Supp. at 12.)

That incongruity the lower court has, it is submitted, by its decision herein, written into the law.

This incongruity is impliedly recognized by the State Department itself. Thus, in an official memorandum from the United States Consul at Yokohama to the State Department in Washington, D. C., on the subject, "Material Regarding Japanese Elections"[8] it is reported that:

"Consular officials stated that because of a desire to assist in establishing a democratic government in Japan, considerable number of American citizens of

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[8]The text of the entire memorandum is available to this court. It is one of the documents filed with the clerk referred to in footnote 4, *supra,* pp. 15 to 17.

> Japanese ancestry—those with dual nationality—voted in the last election on April 10, 1946, without realizing that by so doing they forfeited their American citizenship."[9]

Here then is an implicit recognition by the State Department itself of the manifest unfair position in which a large number of American citizens of Japanese ancestry found themselves by virtue of voting in the Japanese elections, through no fault of their own.

Further evidence of a sympathetic understanding of the position of these Americans may be seen from the document entitled "General Headquarters Far Eastern Command" which is attached as enclosure No. 9 to the same report. A quotation follows:

> "6. Allied instructions that elections be held in 1946 and 1947 also bear on the problems of influence upon voters. Numerous applicants have complained that statements by GHQ officials and by Military Government officials resulted in strenuous efforts by local Japanese authorities to turn out a large vote; these efforts are alleged in some cases to have involved threats to cut off food rations from persons who did not vote. It is claimed that Allied instructions created a state of mental confusion in many cases, so that voters felt they were voting as a result of Occupation requests, and that the sum total

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[9]The full text of the newspaper release, a part of the document hereto referred to on file with the Clerk of this court, is set forth as Appendix A to this petition.

> of efforts to produce a large vote resulted in a state of 'social duress' inducing everyone to vote. . . .[10]

And so it is clear that the statute can not be intended to cover the situation at bar. We have suggested above that what happened here is something akin to entrapment. Imposition of loss of citizenship under such circumstances should not be permitted by this court.

Conclusion.

The Petition for Writ of Certiorari should be granted, the lower court's decision reversed and the judgment of the trial court reinstated.

Respectfully submitted,

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FRED OKRAND,
Attorneys for Petitioner.

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[10]It is to be noted that the report referred to was made to the State Department by General Headquarters Far East Command as distinguished from a report by the Supreme Commander of the Allied Powers. The Far East Command is exclusively an agency of the United States Army, consisting of the U. S. 8th Army. (See document on file with the Clerk of this court published by General MacArthur's headquarters and entitled "Selected Data on the Occupation of Japan," page 131 (Chart 4).)

APPENDIX "A."

UNCLASSIFIED

Enclosure No. 2 to Despatch No. 153 dated May 5, 1950, from Yokohama

NIPPON TIMES, Wednesday, April 2, 1947

WARNING GIVEN NISEI NOT TO VOTE IN JAPAN

U. S. Consulate Issues Advice to Protect Citizenship

By the United Press

American consular officials in Yokohama advised American citizens of Japanese ancestry residing in Japan they will forfeit their American citizenship if they voted in the Japanese political elections scheduled this month.

Consular officials stated that because of a desire to assist in establishing a democratic government in Japan, considerable number of American citizens of Japanese ancestry—those with dual nationality—voted in the last election on April 10, 1946, without realizing that by so doing they forfeited their American citizenship.

While urging American citizens of the Japanese race residing in Japan—there are approximately some 15,000—to continue to use their knowledge of American democratic principles to assist the Occupation forces and the Japanese people in establishing democracy in Japan, consular officials expressed the hope that such persons would be informed that under the United States nationality laws voting in a political election in a foreign state is one of the ways American citizenship can be lost.